No. 2720

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA SALMON COMPANY
(a corporation),
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

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Filed this..................day of March, 1916.

FRANK D. MONCKTON, Clerk.

By..............................Deputy Clerk.

Filed
MAR 3 - 1916
F. D. Monckton, Clerk

PERNAU PUBLISHING COMPANY

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Statement of the Case.

This case involves in its most general aspect consideration of the power of the Legislature of the Territory of Alaska to impose and collect taxes or license charges upon the output and appliances of salmon canneries in the territory.

The solution of the question depends upon the legislative history affecting the subject, and it may be of service to the Court here to state in the briefest possible manner such historical record.

I.

On June 26, 1906, Congress enacted a law entitled: "An Act for the Protection and Regulation of the Fisheries of Alaska". This Act is printed in full in the Transcript (pages 46-54). It is devoted to minute regulations concerning the method of procuring, canning, salting or curing fish, and among other things provides, that every person, company, or corporation carrying on the business of canning fish within the Territory of Alaska shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: "Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton". This law is still in force, unless it has been amended by the Organic Act and the Acts of the Territorial Legislature, hereinafter discussed.

II.

On August 12, 1912, Congress enacted the Organic law of the territory, by which a legislative assembly was created. This Act differs from previous acts passed by Congress for the creation of governmental agencies for the various territories in the country, in that the powers of the proposed Alaskan Assembly are in many respects expressly limited, whereas the usual expression in the Organic Acts of the territories has been that "the

legislative power of a territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States locally applicable''. This Organic Act is set out in full in the Transcript, pages 22-36, and Section 3 thereof (Trans. pp. 23-24), is particularly concerned with the presentation of this case.

III.

On May 1, 1913, the newly created legislative assembly of the territory enacted a law designated as "House Bill No. 96" (Trans. pp. 59-64). By this bill any person, corporation or company prosecuting the line of business of conducting fisheries was made liable to pay for a license so to do; seven cents per case on sockeye and king salmon; one-half cent a case on humpback, cohoe, or chum salmon. License charges were also fixed for many other industries within the territory.

In January, 1914, it was held by this Court in the case of

Callahan v. Marshall, 210 Fed. 230,

that that portion of House Bill 96 which purported to impose a poll tax upon the male persons in the territory was invalid on two grounds: First, because the designation of the United States Commissioner as the poll tax collector was invalid, since the United States Commissioner was ineligible to any other office under the government of the territory; and second, because no poll tax could,

under any of the terms of the Act be collected for the year 1913, since there was no territorial treasurer in Alaska until July 3, 1913.

IV.

On August 29, 1914, Congress, obviously to cure the imperfections in the Organic Act noticed by this Court in the aforesaid case, amended the Organic Act so as to provide that nothing should prevent the Territorial Legislature from passing laws imposing additional duties upon the Governor, Commissioner and other United States officials.

V.

Finally, on April 29, 1915, the Territorial Legislature amended House Bill No. 96 by the passage of House Bill No. 109 (Trans. pp. 38-46), by which it was provided that any person, firm or corporation prosecuting or attempting to prosecute certain designated lines of business in the Territory of Alaska should first apply for and obtain a license. For this license there was to be paid, as concerns fisheries: Salmon canneries, four cents per case on kings and reds or sockeye; two cents per case on medium reds; one cent per case on all others. That for salteries there should be paid two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring; and on fish-traps there

should be paid one hundred dollars per annum for fixed or floating traps; for gill-nets one dollar per hundred fathoms or fraction thereof.

The Alaska Salmon Company, plaintiff in error and appellant, has owned and operated a salmon cannery in Alaska since 1901, with the exception of the year 1909, and during all the times covered by the operation of these Acts, with the exception of 1909, was operating its cannery. If it paid the tax required by the Act of 1913, and for the years 1913-14, it would require the sum of $4643.60 (Trans. p. 65) and for the year 1915 it would be obligated to pay for salmon packed $1158.28, and for gill-nets used $131.75, together with interest on these respective sums at the rate of eight per cent per annum from January 15, 1916. (Trans. p. 58.)

The company has up to date and including the years 1913-1915 inclusive, paid all the license fees imposed by the aforesaid Act of Congress of June 26, 1906, and has complied with all the other provisions of said Congressional Act, and the license fees and taxes so paid by plaintiff in error have been accepted by the United States under the provisions of said Act of June 26, 1906. (Trans. p. 57.)

The plaintiff in error, however, has declined to apply for or obtain a license from the Territory of Alaska, as required by House Bills 96 and 109, under claim that it having paid the taxes imposed by the Act of Congress, it was not obligated to again pay the territory upon the same output. By reason of the refusal of the company to so take out

a license for its said business, it has been deemed guilty of a disdemeanor; and thereupon the company and the territory have submitted the controversy at issue upon an agreed statement of facts, under the provisions of Chapter 28 of the Code of Civil Procedure of the District of Alaska. In this statement it is expressly provided that an appeal or writ of error would lie in behalf of the party against whom judgment was given in the trial Court. (Trans. p. 69.) Upon this agreed statement of facts the cause was submitted to the District Court of the Territory of Alaska, Division No. 1, and a judgment given in favor of the territory, from which judgment this writ of error and appeal has been prosecuted.

VI.

SPECIFICATIONS OF ERROR RELIED UPON.

1. The Alaska Salmon Company, having complied with all the conditions and paid the license fees imposed by the said Act of Congress, is not required to apply for a license and pay the license fees and taxes imposed by the Acts of the Legislature of Alaska, approved May 1, 1913, and April 29, 1915.

2. The legislative assembly was prohibited from passing any law relating to fish or fisheries in the Territory of Alaska.

3. The plaintiff in error is not liable for the alleged license charges or taxes because no assess-

ment was made upon the property of plaintiff, as provided in the Organic Act.

4. The owners of private salmon hatcheries who were also engaged in the business of canning salmon in Alaska are by virtue of certificates issued to them by the Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled, by virtue of such certificates to have the same applied pro tanto, in payment of all license fees and charges, not only imposed by the said Acts of Congress, but also by said Acts of the Legislature of Alaska.

Succinctly, the agreed statement of facts states: (Trans. p. 68) that the questions which are now brought to this Court for decision, and which are covered by the agreed statement of facts, are as follows:

> 1. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said Acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the said Act of the Legislature of Alaska designed as House Bill No. 96, approved May 1, 1913.
>
> 2. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said Acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the Act of the Legislature of Alaska known as House Bill No. 109, approved April 29, 1915.
>
> 3. Whether or not the owners of private salmon hatcheries, who are also engaged in the business of canning salmon in Alaska are, by virtue of certificates issued to them by the

> Secretary of Commerce and Labor for salmon fry liberated from their said hatcheries, entitled by virtue of such certificates, to have the same applied *pro tanto,* in payment of all license fees and charges, not only imposed by the said Acts of Congress, but also by said Acts of the Legislature of Alaska.

Argument.

I.

GENERAL POWERS OF THE TERRITORIAL LEGISLATURE.

There can be little uncertainty concerning the nature of the territorial government since the repeated decisions of the Supreme Court upon that subject. The Territorial Legislature is a creature of Congress subject entirely to its control. That Court has said:

> "that the territory is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to congressional supervision. Its attitude to the general government is no more independent than that of a city to the state in which it is situated and which has given to it its municipal organization."

Talbott v. Silver Bow County, 139 U. S. 438, at p. 446.

With these plenary powers of control, it is obvious that Congress may restrict the powers of the Territorial Legislature to such an extent as it sees fit. In other cases Congress has contented itself merely with restricting the legislative power

of the territory to any subject not inconsistent with the Constitution and laws of the United States. It placed no other express limitations of power and such was the character of the Organic Act creating the Territory of Hawaii as construed by this Court in

Peacock Co. v. Pratt, 121 Fed. 772.

The terms of the Alaskan Organic Act make it plain that Congress was unwilling in this instance to confer these broad powers freed from any limitations. Alaska had been governed since 1884 directly by Congress, under the provisions of what was then called the "Organic Act" and the remote position of the territory and the peculiar conditions there prevailing evidently influenced Congress in retaining to a very considerable extent that direct control which it exercised for so many years prior to the creation of the Legislative Assembly. So Congress provided by this Organic Act (Trans. p. 23):

> "That all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature; Provided, that the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal or other general laws of the United States, or to the game, fish, and fur-

seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes', approved January twenty-seventh nineteen hundred and five, and the several Acts amendatory thereof; Provided further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses. And the Legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction or function exercised by like judges or officers of District Courts of the United States."

Critically analyzing this section, it is seen that Congress has withheld from the Territorial Legislature all power of legislation of any kind concerning the following four general classes of subjects:

1. The customs, internal revenue, postal, or other general laws of the United States.
2. The game, fish and fur-seal laws and laws relating to fur-bearing animals.
3. The laws of the United States providing for taxes on business and trade.
4. The Act of January 27, 1905, providing for the construction and maintenance of roads, etc.

It seems necessary to first more narrowly define these four excepted classes.

The first subdivision concerning the "customs, internal revenue, postal or other general laws of

the United States" requires no further definition as the subjects therein named are clearly marked out in the Revised Statutes.

The second subject, so far as it refers to fish, directly excepts the Act of June 26, 1906, which at the time of the passage of the Organic Act was the only congressional law in force for the protection and regulation of the fisheries of Alaska.

The third subdivision excepting the laws of the United States providing for taxes on business and trade is somewhat ambiguous, since there are many Congressional Acts which provide for occupation taxes. We assume, however, that this third subdivision more particularly refers to an Act as amended June 6, 1900 (31 Stats. at Large, 331) by which any person, corporation or company prosecuting certain lines of business within the District of Alaska was required to apply for and obtain a license so to do. The lines of business therein named number some forty-two and among them is designated fisheries. They were required to pay by this Act:

For salmon canneries .... 4c per case ;
salmon salteries ....10c per barrel;
fish oil works ....10c per barrel;
fertilizer works ....20c per ton.

We here emphasize that the Act of June 26, 1906, providing for certain license fees and taxes upon the output of fish canneries and regulating the control of the fish industry, was subsequent in point of enactment to this Act providing for a

tax on business and trades; and therefore, at the time of the passage of the Organic Act, the license fees and taxes imposed upon the salmon industry were not those provided by the trade and business Act or any other revenue measure, but by the later Act of June 26, 1906.

The fourth and last excepted legislation is the Act of June 27, 1905 (33 Stats. at Large, 616). This Act provided for a variety of subjects connected with Alaskan affairs, and particularly that all moneys derived from the occupation or trade licenses should be deposited in the Treasury of the United States, to be expended wholly within the District of Alaska for certain purposes therein named. Thus the license fees which the salmon canneries now pay to the Federal Government are devoted wholly to (1) one-fourth for the establishment and maintenance of public schools in Alaska, (2) five per cent to the care and maintenance of insane persons, and (3) the residue to the construction and maintenance of wagon roads, bridges and trails.

II.

THE TERRITORIAL ACTS IN IMPOSING A TAX ON THE SALMON INDUSTRY ARE INVALID BECAUSE PROHIBITED BY THE ORGANIC ACT. THE PROVISO FOR OTHER AND ADDITIONAL TAXES AND LICENSES DOES NOT APPLY TO THE SALMON BUSINESS.

The two Acts of the Territorial Legislature under review undoubtedly "alter, amend, modify and re-

peal'' an Act of Congress then in force in Alaska, viz., the Act of June 26, 1906, because that was an Act ''relating to fish'' which expressly provided that the payment of the license fees thereby imposed ''should be in lieu of all other license fees and taxes therefor and thereon''.

The learned Court below in an instructive opinion, which is printed in full in the Hoonah Packing case (Trans. pp. 6-25), held that the second proviso in Section 3 of the Organic Act, above quoted, by which the Legislature was not prevented from ''imposing other and additional taxes and licenses'', operated as a repeal of that portion of the Act of June 26, 1906, above quoted. It seems obvious that this is the only ground upon which the territory can stand if the judgment below is to be affirmed and it now be held that the Legislature has the power to levy taxes upon the salmon industry in addition to those provided for by the Act of June 26, 1906. It is our contention that this proviso for other and additional taxes and licenses was intended to apply to a classification of subjects other than the fishing industry, because that industry stands by itself.

The foregoing resume of Congressional enactments makes it plain that the fisheries of Alaska were first regarded merely as an industry from which revenue could be obtained, and by the Act of June 6, 1900, they were classed with other industries and occupations named in the trade and business Act. This theory of Congressional control prevailed for some six years; then by the Act of

June 26, 1906, the salmon fisheries and the business of salmon canning were separated from other trades and occupations and placed in a class by themselves, and since the pasage of this Act of 1906, Congress has dealt with the salmon industry as a business separate from other occupations.

When the Organic Act was passed, the only tax on the fishing industry was that provided by the Act of June 26, 1906. As is shown by its title and its subject matter, it is a law which relates only to fish and fish products in Alaska; it contains many minute requirements concerning salmon hatcheries, the erection and maintenance of fish appliances, for closed seasons, for the discretionary powers of the Secretary of Commerce and Labor in closing streams, for labels to be used upon canned salmon, and for the making of detailed annual statements to the Secretary of Commerce and Labor, which statements are used as a basis upon which the license fees to be paid the Federal Government are estimated.

That portion of the Act which provides for license fees and taxes is inseparably connected with these provisions of the Act. Thus, the first statement is that the license taxes therein provided shall be "in lieu of all other license fees and taxes *therefor* and *thereon*". The word "therefor" refers to the right to carry on the business of "canning, curing or preserving fish or manufacturing fish products in the territory known as Alaska"; and the word "thereon" refers to the antecedent word "products", so that it was clearly the intention of

Congress to provide that the taxes thereby levied should be exclusive of the right to further tax either the business or the product of that business. They were thus expressly made in lieu of any occupation tax and also any *ad valorem* tax.

The object and purpose of this Act was the protection, regulation and encouragement of the fisheries. If those engaged in the industry would comply with the drastic regulations of the Act, and thus protect the supply, they were to be absolved from any other taxation. The license imposed, therefore, was not primarily a revenue measure, but a leverage to compel those who fish to foster the industry against exhaustion of supply, by protecting the fish and replenishing the waters.

Informing light upon this intention is shown by the provisions of Section 2, providing for private salmon hatcheries. This section (p. 47) states that the owners of private salmon hatcheries that have been approved by the Secretary of Commerce and Labor

> "shall be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand red or king salmon fry liberated".

The same section later provides (p. 48)

> "that it shall be the duty of all public officials charged with the duty of collecting or receiving such license fees or taxes to accept such certificates in lieu of money in payment of all license fees or taxes upon or against the pack of canned salmon at the ratio of one thousand fry for each ten cases of salmon".

Thus *ex industria* did the Congress signify that one of the main purposes of the Act was to encourage the propagation of fish, and that every one thousand fry liberated should be an equivalent for any license fee or tax that might be levied by any governmental authority upon ten cases of salmon.

When, therefore, the Congress in the Organic Act provided that the Territorial Legislature was not prevented from levying "other and additional taxes and licenses", it is submitted that it could not have intended to repeal this law of June 26, 1906, devoted to the protection and regulation of the fisheries, but, at best, the only purpose of the proviso was to refer to measures for revenue purposes only, and not to an Act such as here under consideration, where the revenue is only an incident to the main purpose of the protection and propagation of fish.

The reason that Congress should thus have differentiated between the other industries which were taxed under the trade and business Act, such as abstract offices, banks, boarding-houses, etc., and the salmon fishing industry, is not far to seek. The salmon is a deep sea fish, whose habitat is the ocean, and its presence in the rivers and streams of Alaska is for spawning purposes only. The salmon is no more to be considered the fish of Alaska than are the fur-seals that formed the subject of the arbitration between Great Britain and the United States to be considered aquatic animals of Alaska. Salmon are part of the food supply of the American people, just as are the cod on the

Great Banks and the blue fish of the North Atlantic. The use of the Alaskan shores and rivers is but an incident of the fishery; the object of the industry, the supply, comes from waters in no sense Alaskan. Congress, by this Act, announced its policy of endeavoring to protect this great food supply and of retaining that control with Congress. It emphatically stated that it did not desire the territory to interfere with this control. The taxation upon the industry is inseparably connected with the other provisions concerning the protection and propagation of the fish.

Aside from the point that the salmon is a deep sea fish, which is not an Alaskan product, it may be well to notice in passing that *canned* salmon, which is the output of the salmon canneries, is by no means the sole product of Alaska. The only element of its value which is derived from Alaskan waters even, is the raw product; the tin plate and solder that go to make up the cans, the labor, the fishing appliances, all are taken into Alaska from other places, so that the proportionate value which the raw fish have to the value of the canned product is infinitesimal.

If the territory can now levy a tax of four cents a case on canned salmon, in addition to a like heavy tax already imposed by Congress, then it can increase this taxation from year to year. Indeed, the Act of 1913 did provide for a tax of seven cents a case upon red salmon, which in addition to the tax of four cents imposed by Congress *would have resulted in a tax of eleven cents per case upon*

the product. Such taxation has the direct effect, of course, of raising the price of the food product to the public, for the canning industry is not established, nor does it exist, to supply the local wants of Alaska, but to preserve this important article of food for transportation throughout the world.

It follows that the Federal license tax on the salmon canning industry is properly not found in a revenue law but in a fish law, entitled "An Act for the protection and regulation of the fisheries of Alaska"; that it is not inserted in this law merely as a revenue measure, but that it is an integral part of the entire scheme of the Act, the purpose of which is to compel the protection of the fisheries. Congress has said by this Act, to every person or company intending to engage in the salmon business in Alaska: "There are many minute regulations which you will be compelled to obey, but if you will so comply, we say to you that upon the payment of four cents per case, you shall be relieved from all other taxation upon your business and your manufactured product". Thus, this Federal license tax must be considered in conjunction with the entire Act, and that Act and every part thereof must be deemed a "fish law" which the Territorial Legislature has been expressly forbidden to alter, amend or repeal.

If, therefore, this proviso to levy other and additional license fees and taxes has operated as a repeal of that portion of the Act of June 26, 1906, providing for license fees and taxes on canned salmon, then it has also operated as a repeal of the entire Act of June 26, 1906, because these license

fees and taxes when considered in connection with the hatcheries must be taken together.

It is our contention that if it had been the purpose of Congress to repeal that portion of the Act of June 26, 1906, which states that the license fees thereby imposed shall be in lieu of all other taxation, which the Congress undoubtedly has the power to do, then that such statement would have been made *directly* and by an express repeal; it would not have been done by an implied repeal through an incidental proviso. In *Minis v. United States,* 15 Pet. 423, it was said at page 445:

> "* * * The office of a proviso, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

Where a State law provided that the licenses thereby imposed upon insurance companies should be in lieu of all town and municipal license charges, but contained a proviso that the section should not be construed to prohibit cities having an organized fire department from levying a tax or license fee not exceeding two per cent on the gross receipts of such insurance agency, it was held that the proviso did not confer any power on a city or incorporated town, and *that it was not a grant of power.*

> *City of Chicago v. Phoenix Insurance Company,* 18 N. E. 668.

Said Mr. Justice Story in *United States v. Dickson,* 15 Pet. 141, at page 165:

> "* * * We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof."
>
> *Appeal of Clark,* 20 Atl. R. 456.

In *Baggaley v. Pittsburg etc. Iron Co.,* 90 Fed. 636, it is said:

> "We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act."

And in *State v. Weller,* 85 N. E. 761:

> "* * * The cardinal rule in the interpretation of statutes is to ascertain and give effect to the general intent of the act, if that can be discovered. Effect should be given to

every word and clause, and such a construction as will make a proviso plainly repugnant to the body of the act avoided, if possible."

The amount of the license taxes to be paid by the fisheries under the Act of 1900 (the trade and business Act) and the Act of 1906 (the fish Act) is practically identical:

Act of June 6, 1900.	*Act of June 26, 1906.*
Salmon canneries, four cents per case.	Canned salmon, four cents per case.
Salmon salteries, ten cents per barrel.	Pickled salmon, ten cents per barrel.
	Salt salmon in bulk, five cents per 100 pounds.
Fish-oil works, ten cents per barrel.	Fish oil, ten cents per barrel.
Fertilizer works, twenty cents per ton.	Fertilizer, twenty cents per ton.

The Act of 1906, Section 15 (p. 54), stated "that all Acts or parts of Acts inconsistent with the provisions of this Act are, so far as inconsistent, hereby repealed". Thus, by the Act of 1906, all provisions of the trade and business Act providing for taxes on the fishing industry were expressly repealed.

When we find these license tax provisions lifted bodily out of a general revenue Act and incorporated in substantial identity into an Act for the protection of the fisheries, we must presume that there is some reason for such action; that Congress no longer deemed it proper that this tax should be incorporated in the general revenue measure.

It now is disposed to treat the license tax more in the nature of a penalty than for revenue. Its effect is not other than if it provided that all persons engaged in salmon canning who shall propagate and liberate one thousand salmon fry, for every ten cases of salmon canned shall be *pro tanto* released from all taxation. The tax, therefore, was a conditional one inseparably connected with other provisions by which Congress sought to encourage the establishment of hatcheries and the propagation of fish. If all these provisions have been repealed by the simple proviso that the Territorial Legislature may levy other and additional taxes and licenses, then the whole purpose of the Act has been taken away, and Congress has said to the Legislature, "You may not change the fish laws of Alaska directly, but you may by increasing the taxation on the salmon industry indirectly accomplish this same result. We have said to the owner of every salmon hatchery, in order to further the propagation of fish, that we will release him from the payment of taxes by accepting, in lieu of money, certificates for his fry liberated; but we now permit you to abrogate this law by imposing taxes which cannot be paid by such certificates.

The learned trial Judge in his opinion said:

> "As the Organic Act (the Act of 1912) is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former Act which is in conflict therewith, to wit: 'shall, in lieu of all other license fees and taxes'."

With all due respect, it is submitted that the learned Judge has not established his premises. He

has assumed a necessary conflict in order to find an implied repeal; he makes no effort to ascertain if the conflict does exist and if the two Acts can be construed in harmony. Such harmony can be found by assuming that the additional license fees and taxes permitted referred to the only Act which was concerned with that subject, viz., the trade and business Act. We have already shown that the salmon industry is not taxed by Congress under this Act or, possibly, more legitimately may we claim that this right to levy other and additional taxes must refer to other occupations than those named in the trade and business Act.

It would be extraordinary if Congress in the Organic Act has said to the embryonic Legislature, "You may not alter, amend or repeal the trade and business Act, but this must not be construed as preventing you from levying other and additional taxes". This is the same thing as saying, "You may not change the trade and business Act, but you can change it by increasing the taxes".

What, then, did the Congress mean when it said that the Territorial Legislature could not change any one of the four designated classes of laws, but that this provision should not operate to prevent the Legislature from imposing other and additional taxes and licenses? *Surely it did not mean that the Territorial Legislature could impose other and additional customs, internal revenue and postal taxes and licenses.* Yet if the contention of the territory here made is to be sustained, it must

be held that this permission authorized the Territorial Legislature to increase the charges for all or any of the four excepted classes, and the customs, internal revenue and postal laws stand *in pari materia* with the fish laws.

Nor can it mean that Congress thereby intended to repeal the fish laws of the United States applicable to Alaska, because the first proviso had distinctly stated that the Territorial Legislature had no such power. Nor can it mean that the Legislature had power to change the taxes on trade and business, because the first proviso distinctly stated that it had no such power. Reading the legislative intent, as far as we may, from the Acts themselves, it would seem as if the point had been made that the four exceptions named *might* prevent the Territorial Legislature from levying any taxes or imposing any license charges upon a business that had not been previously taxed by Congress; that in order to prevent this the Legislature was by this second proviso not prohibited from imposing taxes and license fees upon lines of business or upon property *that were not already taxed by Congress.* It will be noted that the language used is "imposing other and additional". Thus the tax must be both "other" and also "additional". Its evident purpose was to prevent the Territorial Legislature from imposing what is, in fact, double taxation by taxing the industries which had already been taxed by Congress.

This Organic Act did not create a Territorial Government for Alaska; it simply created a Legislature. The other departments and instrumentalities of Government continued as established by prior Acts of Congress. The funds to support these other departments and instrumentalities were appropriated out of the general funds of the United States. The only means which the United States had to raise revenue from Alaska was from "taxes on business and trade".

Binns v. United States, 194 U. S. 486.

The expenses of the Federal Government to maintain those departments and agencies of government directly under its control would continue and probably increase. By this Act it conferred on the Territorial Legislature power to enact property tax laws (Sec. 9) theretofore non-existent in Alaska. Can it be wondered that Congress jealously undertook to preserve to the United States its sole source of revenue and forbade the Legislature to interfere therewith? If the Legislature had power to amend, alter or repeal these license tax laws, it could impair the revenues of the Federal Government derived from Alaska, or could stop them altogether and thus absolve Alaska from contributing anything to the support of these departments of government. Similarly if granted the power of imposing license taxes on lines of business already subject to the Federal license tax, it could tax them out of existence and thus interfere with the Federal revenue. It could also as already

seen, by so doing, increase the cost of food supplies or drive out of business those engaged in the production thereof by excessive taxation.

If the proviso is to be construed as an exception to the first proviso, there can be no question that the Legislature may impose a license tax on business already subject to the Federal tax. But the object sought to be attained in the previous proviso refusing to grant authority to amend, alter or modify these laws, would be so seriously weakened and impaired thereby that it is incredible that such is the intention. The reasonable interpretation would seem to be that the proviso was inserted out of excess of caution so that it could not be contended that the United States reserved to itself the sole power to impose license taxes and that the territory could not impose such taxes on businesses not subject to the Federal tax. A tax on another line of business can be as readily construed to be an "other and additional tax and license" within the meaning of the Act, as a tax superimposed on an existing tax. The Act being open to both constructions, that should obtain which will give full effect to the manifest policy and purpose of the Act. One construction makes the second proviso in part repugnant to the first, the second makes both harmonize.

As said in *Savings Bank v. United States,* 19 Wall. 227, 236:

> "The broad construction of the proviso contended for makes it plainly repugnant to the

> body of the act, and it is, therefore, inadmissible."

And in *Treasurer v. Clark,* 19 Vt. 129, it is said:

> "But we prefer giving this portion of the statute a sensible meaning, if it will fairly bear such a construction. And we think it will. In order to do this, we have only to limit the extent of the signification of the terms used in the proviso by the general scope of the enacting clause."

The construction sought to be given the word "additional" is not strained. The Supreme Court of Oregon has so applied the word, under somewhat analogous circumstances.

The Constitution of Oregon provides that "while an amendment or amendments (to the Constitution) which shall have been agreed upon by one legislative assembly, shall be awaiting the action of a legislative assembly or of the electors, no *additional* amendment shall be proposed".

In *Kadderly v. City of Portland,* 74 Pac. 710, the questions submitted to the Court in interpreting this section were whether it "prohibits the proposing of an amendment to the Constitution while an amendment of other or different portions of that instrument is pending", or whether "the provision quoted is to be considered as applying only to an amendment on the same subject or article as that previously proposed". The decision turned on the construction of the word "additional". The Court said (p. 717):

> "* * * the meaning of the Constitution is that, while an amendment or amendments

> agreed to by one legislative assembly shall be awaiting the action of a legislative assembly or the electors, *no additional amendment or amendments shall be proposed to any part or clause of the Constitution.*"

But even assuming that the Territorial Legislature is empowered to impose additional license taxes on businesses already subject to the Federal tax, it must be admitted that that is the limit and extent of its authority to legislate in respect to otherwise prohibited subjects. It cannot be contended that in order to impose such tax, it can in *other respects modify, alter, amend or repeal one of these laws.*

Yet the Act of June 26, 1906, provides (Sec. 2):

> "that the catch and pack of salmon made * * * by the owners of private salmon hatcheries * * * *shall be exempt from all license fees and taxation of every nature* at the rate of ten cases of canned salmon to every one thousand * * * fry liberated."

As long as this clause stands, every owner of a hatchery who has liberated one thousand fry is entitled to claim exemption on ten cases from all license taxes of every nature. The territorial tax cannot be enforced thereon, unless this Act has been amended, altered or modified by limiting the operation of this clause, and making it applicable not to taxes of every nature, but only Federal taxes.

It has already been shown that the Act of June 26, 1906, is not a revenue law; that the license tax

provided for thereby is not for the purpose of raising revenue but to compel replenishment of the waters and is not included in the clause "laws providing for taxes on business and trades in the Act of August 24, 1900". This clause is the last germane clause in the Act preceding the further proviso. If the proviso relates solely to this clause, and does not relate to the clause, "the game, fish and fur-seal laws" of course the Legislature had no authority by its Act to alter or modify the Act of June 26, 1906.

From the language of the proviso, it is obvious that it was inserted only because of the presence of the clause "or to the laws of the United States providing for taxes on business and trade". That it applies solely thereto appears so obvious from the mere reading, that it seems almost unnecessary to apply a rule of construction to determine the question. But the rule as stated in *Lewis' Suth. Stat. Constr.*, Sec. 352, is that a proviso "should be construed with reference to the immediately preceding parts of the clause to which it is attached".

> "The proviso * * * must be construed with reference to the preceding parts of the clause to which it is appended."
>
> *Ex parte Partington*, 6 Q. B. 649, 653.

> "In the construction of a statute, the question whether a proviso in the whole or in part relates to, and qualifies, restrains, or operates upon the immediately preceding provisions only of the statute, or whether it must be

taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend, I think, upon its words and import."

King v. Newark-upon-Trent, 3 Barn. & Cres. 59, at 71.

"Such a clause is ordinarily to be confined to the last antecedent, unless there is something in the subject matter, which requires a different construction."

Cushing v. Worrick, 9 Gray 382, 385.

See also

Spring v. Collector, 78 Ill. 101;
Lehigh v. Meyer, 102 Pa. St. 479.

However, conceding that the Act of August 24, 1912, conferred generally upon the Legislature the power to impose additional taxes and licenses upon those lines of business already taxed under the provisions of the Act of March 3, 1899, still the scope and extent of this power conferred must be ascertained and determined by a consideration of the Act in its entirety. It must be construed so as to give effect to each and all of its provisions if possible. The true meaning of any clause or provision is that which best accords with the subject and general purpose of the Act in every other part.

The Act withheld from the Legislature the power to alter, amend, modify or repeal the fisheries law. It also provided that this provision "shall not operate to prevent the Legislature from imposing other and additional taxes and licenses". The

prohibition against altering or amending must be construed in connection with the provision allowing the imposition of other and additional taxes and licenses. It was undoubtedly the purpose of Congress to continue in force in their full integrity the laws relating to fisheries and the other subjects above enumerated. The language used to effectuate this purpose was broad and comprehensive; the Legislature was forbidden to do any act that could remotely encroach upon the four forbidden subjects or the Acts of Congress relating thereto. It was commanded to withhold its hands from those subjects. Such being the manifest purpose of the Act, it can hardly be conceded that in the same Act and Section Congress would have used language that would frustrate such purpose; if it had intended to do so, it would have used clear, unmistakable and affirmative words to express that intention. Any construction of the Act which would authorize the Legislature to alter or modify the fisheries law or the other forbidden subjects would seem to frustrate the very purposes of the Act and convict Congress of gross absurdity.

> "The power to alter depends upon the meaning of the word 'alter'. To alter is to make different without destroying identity, to vary without an entire change."
>
> *Barrett River Co. v. Holway*, 59 N. W. 126.

It was, therefore, the intention of Congress that the fisheries law should not be varied or changed, even in any of its details or provisions. One of the provisions of the fisheries law of June 26, 1906,

was that the licenses therein provided for shall be "in lieu of all other license fees and taxes therefor and thereon". The Act of the Legislature involved in this controversy manifestly alters the foregoing provisions; it changes the fisheries law, at least to that extent, which is in conflict with the prohibition against altering, amending or modifying the fisheries law contained in Section 3 of the Act of June 24, 1912. Yet it is a fundamental principle of statutory construction that all of the provisions of an Act must be construed so as to allow all of the provisions to stand if possible, and it would seem that from any point of view the power to impose other and additional taxes and licenses, if given, must be limited to those lines of business contained in the Act of March 3, 1899, exclusive of the provisions therein contained relating to fisheries. The imposition of other and additional licenses upon abstract companies, banks, electric light plants and other lines of business, except the fisheries, mentioned in the Act of March 3, 1899, does not involve any conflict with the prohibition against enactments by the Legislature to alter, modify or amend the provisions of the Act, for the reason that the Act of June 24, 1912, provides expressly that the imposition of other and additional taxes shall not be construed to be an alteration or modification of the Act. The imposition of additional licenses or taxes upon other lines of business except fisheries does not involve a conflict with the provision against alteration or modification of the

fisheries law of June 26, 1906, neither does the imposition of such additional licenses upon such lines of business, exclusive of the fisheries, conflict with the customs, internal revenue, postal, or other general laws of the United States, or the laws relating to game, fish, fur-seals, or to the Act relating to the construction and maintenance of roads. Therefore, it follows that as to all lines of business mentioned in the Act of March 3, 1899, except the fisheries, the Legislature of Alaska has a free hand to impose other and additional licenses or taxes, to any extent that it may see fit. It cannot impose other or additional licenses upon the fisheries, because such attempt directly conflicts with the fisheries law of June 24, 1906. This construction and interpretation of the Act of 1912 preserves the prohibition against the alteration of existing laws, and at the same time renders effective the proviso permitting the imposition of other and additional licenses, except as to the fisheries. In other words, the provision as to the imposition of additional licenses and taxes upon lines of business already taxed by the existing law, can be held to apply to the laws of the United States providing for taxes on business and trade, except as to the fisheries. The Legislature can impose additional taxes upon any lines of business mentioned in that Act, except where such imposition has the effect of altering, modifying or repealing some other law of Congress relating to the four subjects above enumerated. The power of the Legislature to raise money for the support of the government of Alaska is broad and comprehensive.

It embraces all lines of business mentioned in the Act of 1899, except the fisheries. The fisheries Congress reserved under its exclusive jurisdiction. All other lines of business mentioned in said Act were turned over to the Legislature for licensing and taxing without restriction or limitation.

The power to impose other and additional licenses, if limited to the other lines of business contained in the Act of March 3, 1899, exclusive of the fisheries, is in entire harmony with the provision prohibiting the Legislature from altering, amending or modifying the fisheries laws, and in no event, it seems to us, can this power to impose other and additional licenses and taxes be construed to extend to the right to alter or amend the fisheries laws, but it must be limited to those lines of business defined in the Act of 1899, exclusive of the fisheries.

The question here presented to the Court for decision is a narrow one. Outside of the general principles before-mentioned and illustrated by leading cases, little aid can be apparently given to the citation of authority. It is our duty to seek the legislative intent as it appears from these Congressional Acts, however darkly or gropingly such intent may have been expressed. The territory claims that the same product may be taxed twice, once by Congress and secondly by the Territorial Legislature, and this notwithstanding that the money derived from the Federal tax is devoted entirely to the needs of the territory. (Act of January 27, 1905, 33 Stats. at Large, 616.)

Conceding, for the purpose of argument, that Congress had the power to confer upon the Legislature the right to levy additional taxes upon the same lines of business that were already taxed by Congress, nevertheless such power is so unusual and approaches so closely to the abhorrent condition of double taxation, that it should require a specific and affirmative clause to accomplish such result; it cannot follow by implication.

The Act of June 26, 1906, is the only Congressional Act relating to Alaska which states that the license charges thereby imposed shall be in lieu of all other taxes and licenses. It is obvious that this especial clause was inserted for a purpose, which was the fostering of the fish industry. We cannot *assume* that it was the intent of the Congress to encourage the salmon industry by holding out the assurance that the tax levied by Congress should be the only tax levied upon the business, and then in the next breath state that the Territorial Legislature—the creation and subject of Congress—might levy additional taxes thereon.

It is respectfully submitted, that the only effect that can be given under well recognized rules of construction to this proviso, concerning the right to levy other and additional taxes and licenses, is to confine it either to a classification of businesses not theretofore taxed or, at best, to confine it to those lines of business which were taxed under general revenue measures, and not as is the fish industry under a special law.

III.

IF THE PROVISO IN QUESTION REPEALED THE ACT OF JUNE 26, 1906, BY ELIMINATING THE PROVISION THAT THE TAXES THEREBY IMPOSED SHOULD BE IN LIEU OF ALL OTHER TAXES, THEN IT WOULD APPEAR THAT CONGRESS INTENDED TO TAKE AWAY ITS OWN POWER OF TAXATION UPON THE SALMON INDUSTRY.

The validity of the taxes imposed by the Congressional Act is not now before this Court, and this subdivision of the argument is inserted merely for the purpose of directing attention to one phase of the inquiry; this is, that if the taxation features of the fish law have been repealed, so far as holding out the assurance that they are the only taxes, then the clause authorizing the taxes has been repealed. Reading this Act of June 26, 1906, by its four corners, it is made clear that all of the other provisions of the Act, imposing duties and regulations upon those engaged in the salmon industry, are counter-balanced by the statement from the Government that the industry shall not be taxed, excepting as Congress has stated. Many new salmon canning establishments have been started in Alaska during the ten years since the passage of this fish law, and under its assurance. It is reasonable to suppose that if Congress desired to change the amount of taxation, that consideration would also be given to the other features of the fish bill which imposed duties upon the salmon operators. If the Government had intended to with-

draw the assurance which it held out, it may well be supposed that it would relax some of the regulations that it imposed.

The withholding from the Territorial Legislature of any power to in anywise change the laws relating to salmon, makes it clear, of course, that Congress intended to retain the direct and full control and regulative power over that industry. The territory has not attempted to make any regulations concerning the salmon industry or exercise any governmental control over it; this remains with Congress. It therefore will be a singular situation if the territory can now exact payment of heavy taxes from an industry over which it furnishes no protection. The Territory of Alaska is subjected to no expense whatever in connection with the supervision of the salmon industry; all of this expense is borne by Congress through the Bureau of Fisheries. This suggestion we make to show that it could not have been the intention of Congress that it should bear all the expense connected with the governmental control of this great industry and permit the territory to nevertheless exact large governmental charges therefrom. If there had been any thought that the territory might impose taxes upon the industry in addition to those already imposed by Congress, then assuredly there would have been some division of the governmental expense connected with such industry.

IV.

THE LEGISLATIVE ACTS ARE INVALID BECAUSE CONTRARY TO THE FIRST PROVISION OF SECTION 9 OF THE ORGANIC ACT.

This Section 9 (pp. 27-28) begins by stating "The legislative power of the territory shall extend to all rightful subjects of legislation, but not inconsistent with the Constitution and laws of the United States". A tax upon the salmon industry by the Legislature in addition to a similar tax already imposed by Congress is "inconsistent" with a law of the United States, viz., the Act of June 26, 1906. For reasons already stated, these taxes imposed by the Territorial Legislature are inconsistent with the spirit and purpose of the Act of June 26, 1906. It would be an anomalous situation if Congress intended to impose a tax under the Act of June 26, 1906, which states directly that such tax shall be in lieu of all other taxes, pay over the entire proceeds of such tax to the territory and then that a Territorial Act would be "consistent" which proceeded to again tax the same product.

V.

THE ACTS OF THE TERRITORIAL LEGISLATURE IN IMPOSING TAXES ON THE OUTPUT OF SALMON CANNERIES AND THEIR APPLIANCES ARE INVALID BECAUSE IN VIOLATION OF SECTION 9 OF THE ORGANIC ACT.

Section 9 of the Organic Act (pp. 27-28) provides (p. 30):

> " * * * all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year."

The Territorial Act is entitled: "An Act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes" (p. 38); and Section 5 of this Territorial Act provides (pp. 44-45):

> "All taxes levied, laid or provided for in this Act and penalties and interest accrued, are hereby declared to be a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments."

It is manifest that this measure is for revenue purposes and is not levied under the police power. This was directly decided in a case which went to the United States Supreme Court from this Court. *Flanigan v. Sierra County,* 196 U. S. 553. No attempt has been made to base the tax upon the output of salmon canneries or their appliances upon any assessed valuation; nor is there any evidence here that the total tax imposed does not exceed one per cent of the assessed valuation.

The question here presented is of momentous importance, not only to the citizens of Alaska, but also to all the people of this country. This ques-

tion, in brief, is, Can the uniformity clause be set aside in every case by levying a tax under the guise of an occupation or business tax? May the farmer instead of being taxed upon an *ad valorem* basis for his acreage be taxed for carrying on the occupation of a farmer at so much per acre? May the miner be taxed for carrying on the business of mining at so much per ton of output?

It will not be denied that occupation taxes in general are not subject to the uniformity clause. The question here presented goes further; it in practical effect is, May *all* taxes be changed from the form to which we have become accustomed and called occupation taxes?

This ground for claiming that the Territorial Acts are invalid is raised by an assignment of error in this case (p. 7) but it would seem that the argument thereof should more legitimately be made in the other cases now before this Court, wherein taxes are claimed upon a specific species of property, such as traps, gill-nets, etc. We shall therefore not now weary the Court by a repetition of the arguments elsewhere made in this regard by other counsel.

Respectfully submitted,

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